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Supreme Court of the United States,

OCTOBER TERM, 1902.

EDWARD H. PARDEE AND ARABELLA D. HUNTINGTON, EXECUTRIX, AND CHARLES H. TWEED AND ISAAC E. GATES, EXECUTORS, OF COLLIS P. HUNTINGTON, DECEASED,
Plaintiffs in Error,

vs.

A. D. ALDRIDGE, A. F. HARDIE AND W. G. MOWRY, TRUSTEES FOR J. E. DOWNES AND ASSOCIATES,
Defendants in Error.

SUPPLEMENTAL ARGUMENT FOR DEFENDANTS IN ERROR.

W. J. MORONEY,
Counsel for Defendants in Error.

Supreme Court of the United States,

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EDWARD H. PARDEE and ARABELLA D. HUNTINGTON, Executrix, and CHARLES H. TWEED and ISAAC E. GATES, Executors, of Collis P. Huntington, deceased,
Plaintiffs in Error,
vs.
A. D. ALDRIDGE, A. F. HARDIE and W. G. MOWRY, Trustees for J. E. Downes and associates,
Defendants in Error.

No. 137.

SUPPLEMENTAL ARGUMENT FOR DEFENDANTS IN ERROR.

W. J. MORONEY,
Counsel for Defendants in Error.

What we shall now say will be mainly in reply to the brief of plaintiffs in error, which had not been filed when our original brief was prepared. Before discussing the questions of law suggested by brief of plaintiffs in error, it is advisable, first, to correct a number of errors of statement, of more or less

importance, that appear in the brief. When the record is correctly understood, the main contentions of plaintiffs in error become irrelevant or immaterial.

(1.) The brief of plaintiffs in error at least implies that this controversy involves *all* of the Hughes & Slaughter and Mays tracts, including those portions of such tracts that were used for railroad purposes. This is not correct. While in plaintiff's petition (R., 2), all of these tracts were described and claimed, yet on the trial plaintiffs expressly abandoned this claim as to a strip 100 feet wide on the west side of the Hughes & Slaughter tract, and 200 feet wide through the Mays tract (R., p. 150), embracing all the land, with perhaps a trifling exception, that was ever used for railroad purposes; and by the judgment of the Court of Civil Appeals (R., 210, 211), plaintiffs in error recovered this land, and there is no controversy in respect to the same. In the District Court we expressly admitted that this land belonged to defendants, and by the judgment of the Court of which they are complaining plaintiffs in error were awarded the title and possession of the same.

The importance of this matter will now become clearly apparent. In several places in brief of plaintiffs in error, and especially on pages 69 *et seq.*, they undertake to detail the evidence showing to what extent the land was used for railroad purposes. With a trifling exception, which we shall presently notice, absolutely *all* of these railroad uses and improvements were confined within the land as to which plaintiffs below disclaimed, and which plaintiffs in error have recovered. The only exception, if it can be called an exception, is the spur track, shown on map, opposite page 124 of the Record, which is usually designated in the Record as a "Y." There is absolutely no evidence showing or tending to show that this "Y" was constructed until long after the foreclosure of the International

Trust Company mortgage in 1883. There is no evidence that this "Y" was ever used, and the evidence almost certainly indicates that it was never completed. The evidence tends to show that at some period after the foreclosure of the International Trust Company mortgage, the construction of a "Y" was commenced, and then abandoned, because found to be useless and unnecessary. The testimony on this matter is fully presented in appendix to our original brief, pages 55 *et seq.*, to which we respectfully refer the Court. The location of the railroad improvements is shown on maps opposite page 124 of the record. The witness Johnson testified without contradiction as follows: "Leaving out of consideration for the present the round track or Y, the railroad *never* had any improvements east of where they are shown on the map, 75 feet from the west line at the north end and 35 feet from the west line at the south end would include all the railroad improvements that were ever on the land at any time, except the Y, allowing 10 feet east of the centre of the track. I do not know when the Y was built. I found it there in 1891 as shown on the map" (R., 125).

It will of course be observed that plaintiffs in error recovered to a line 100 feet east of the west line of the Hughes & Slaughter tract, and as to this 100 feet there is no controversy. Without now further discussing the testimony, we will say, without fear of successful contradiction, that *there is not a scintilla of evidence anywhere in the record showing or in any way tending to show that prior to the foreclosure of the International Trust Company mortgage in 1883, the Railroad Company actually used any of the land recovered by defendants in error for any purpose whatever.* This is also true of the Mays' tract. The second map, opposite page 124 of the Record, shows a spur track extending 75 feet from the main track, while defendants below, now plaintiffs in error, recovered to a line 100 feet on each side of the main track.

The evidence does not show when this spur track was built, and it is wholly immaterial, because it is located on the land recovered by plaintiffs in error, not claimed by us. The portion of the tract used for sand would also be included within the strip of land 200 feet wide through the Mays tract as to which there is no controversy, and which plaintiffs in error recovered.

(2.) The statement made in brief of plaintiffs in error, pages 2, 3, that the property in controversy was acquired for the "construction and operation of the railroad" and for terminal purposes, is in direct conflict not only with the evidence, but also with the special verdict of the jury, which finds that it was acquired for subdivision into lots and sale (see Special Findings 3*a*, 3*b*, 4, 5, 6, 14, Record, pp. 19-22).

(3.) The statement in brief, page 2, that what we have called the bonus lands had "been given to the company *as originally organized*," is also incorrect. Some of these lands were given to the first company, some to the second and some to the third. This is all correctly stated in our original brief, and the materiality of the matter there pointed out.

(4.) The statement in brief, page 3, that the Mays tract contained a sand bank "and other material adapted to the construction and ballasting of the line," is, so far as the matter in quotation is concerned, entirely without evidence or other matter in the record to support it.

(5.) The statements in brief, page 3, that the Hughes and Slaughter tract was "in the town of East Dallas in 1880," and is "now probably worth at least $50,000," and the further statement (p. 17), that the claims of defendants in error were "generally for small amounts," are all probably immaterial, but they are certainly incorrect, and may

tend to give a false color to the case. The only evidence as to the location of the land when it was bought, with reference to the city limits, was that of the witness Johnson. "When the railroad was built the land was outside the limits of the City of Dallas. In 1889 I think it was taken inside the city limits" (R., p. 128). The only evidence as to the value of the land is that it was assessed at $22,000 (R., 149). The uncontradicted evidence is that the claims represented by defendants in error amount to upwards of $30,000, and if interest for some twenty years be added, they would now amount to over $75,000. (R., 136, 137).

(6.) On page 9, referring to certain execution sales against the *second* company, it is stated that it was the evident purpose to "sell everything to which the Texas Trunk Railroad Company, *as originally organized* or then existing had any claim of title." Of course this is manifestly incorrect. An execution sale against the *second* company could not affect the *first* company, and no such intention is deducible from the record. If such had been the intention it would, of course, have been nugatory.

(7.) On pages 14, 16, it is said that the foreclosure decree directed Atkins, Receiver, to "convey any property standing in his name or to which he had in any manner acquired title." This is incorrect. The only property sold to Pardee was the property described in the Central Trust Company mortgage (R., 98). The only direction to make a deed was to execute "a deed or deeds to said Pardee duly made and executed *of the property sold*" (R. 99). There is absolutely nothing in any order of Court of the character stated in brief of plaintiff in error. This matter is correctly stated in our original brief, page 13, paragraph 14.

(8.) The statement in brief, pages 15 and 16, as to the character of the suit of Atkins *v.* Campbell, the

issues involved, and the nature of the decree, contains much that is imaginative. The facts are coldly stated in the Record, pages 106–114, and are correctly condensed in our original brief, pages 11, 12, paragraph 13. That this decree is wholly immaterial in the present aspect of the case is shown in our original brief, pages 29 *et seq.*

The statement is made in brief, page 37, that "the Circuit Court of the United States had three times adjudged that the two tracts in question had passed out of the Texas Trunk Railroad Company by the foreclosure of the International Trust Company mortgage." This is absolutely incorrect. In neither of the foreclosure suits was any such issue made or involved. No order was ever made appointing a receiver of these tracts. There is no evidence that any receiver was ever in possession of any of the land now in controversy. It is admitted that the issue was made in the suit of Atkins *v.* Campbell, but whether the decree was rendered on that or some other issue does not appear. Even if the issue was there made and decided, the decree would bind only those who were parties and privies, and this effect is conceded to the decree. The decree of a Federal court, when offered in evidence, under a claim of *res adjudicata*, has precisely the same effect as the decree of any other court of competent jurisdiction. The actual owners of the property were not before the Court, and it is surely unnecessary to argue that the decree could not bar their rights. When counsel become frenzied and speak of the Court of Civil Appeals "deliberately, if not maliciously, overthrowing decrees regularly rendered by the Circuit Court of the United States," they are themselves, perhaps, not excessively observing that comity they seem to expect of others. The Court of Civil Appeals correctly decided that every decree of the Federal court was binding on the parties, and their privies, to the extent of the issues made and decided, but that such decrees were not *res adjudicata* as to parties not before the

Court, nor as to issues that were not made or decided. We see in this no occasion for any excitement or alarm.

There are allusions throughout the brief to what is variously styled the "scheme," "venture," &c., of defendants in error, referring to the procedure they adopted to collect their debts. The word "scheme" is used in various senses, sometimes complimentary, sometimes not. It has been used in referring to the Deity, as when the "scheme of creation" is mentioned. We believe the word is never used in an opprobrious sense in referring to the "schemes" of railroad magnates, which are always above suspicion or reproach, and therefore opposing counsel are to be understood as using the word in the euoligistic sense with which they have become familiar through their celestial environment. Any other intention can not be admitted for a moment. The plaintiffs in this suit, whose debts are unquestioned, proceeded to undertake their collection by proceedings prescribed by the laws of the State of Texas. These proceedings have been pronounced proper and efficacious by the Courts of Texas, and in so adjudging no question of Federal law or right was involved. It would seem, therefore, that animadversions on these proceedings at this stage of the case are, to say the least of it, somewhat irrelevant, even though it be the purpose to be complimentary, through the careless use of ambiguous phrases.

We will now discuss some of the questions of law suggested by brief of plaintiffs in error.

Jurisdiction to review questions of fact.

We do not clearly understand what is contended on this question. That the jurisdiction sometimes exists, and at other times does not exist, cannot, we suppose, be seriously questioned. We are only concerned with the question as it arises in cases brought here by writ of error to State courts of last resort.

We think it is settled that in such cases the jurisdiction does not exist. The jurisdiction is subject to even further limitation. It is confined not only to questions of law, but to Federal questions. All questions of local and general law are foreclosed by the judgment of the State Courts. Cases are cited to the effect that this court may "consider the facts." Of course this can be done, in a proper case, and subject to certain well defined limitations. No case can be intelligently considered without considering the facts. It is not supposed that the jurisdiction to review judgments was created or vested for the mere purpose of affording opportunity for academic discussion of abstract legal questions. But where are the facts to be sought—in the breath of counsel, in unsupported assertion, or in the verdict of the jury? This is a case wherein it is sought to review a judgment rendered on a special verdict of a jury, and yet the issues and special findings upon which the judgment was actually pronounced by the Court of Civil Appeals are not so much as mentioned in the able brief of opposing counsel, unless by some fugitive allusions to unnamed matters which are said to have been "manifestly irrelevant," but which were submitted to the jury only because the Court made the "mistake in yielding to the importunities of counsel." No mention is made of the opinion and judgment of the Court of Civil Appeals that these "manifestly irrelevant" matters were the ultimate, controlling issues in the case. We do not question the proposition that when the ultimate facts have been settled by agreement, special verdict, or other proper proceeding, and a question arises whether or not under such facts a party has been denied a Federal right, this Court has the jurisdiction to "consider the facts" as thus established, for the purpose of deciding such Federal question, provided, of course, the question has been raised in a proper time and manner. But no court, in a common law case, has ever been invested with the power to ignore the ver-

dict of a jury on the ultimate issues in a case, and render judgment regardless of the verdict on the Court's view of the evidence. Certainly, no such jurisdiction is vested in this Court. As we have shown in our original brief, special findings on irrelevant matters, or mere matters of evidence or argument, may be ignored as surplusage, as was properly done by the Court of Civil Appeals in this case, but this cannot be done in respect to findings on ultimate issues. What were the ultimate issues, and how is the question to be answered? Manifestly from an examination of the language of description used in the mortgage. This clearly shows that the mortgage included lands "used" for railroad purposes, and lands "intended" for railroad purposes, and nothing else. Waiving all questions that might manifestly be made as to the legal sufficiency of these terms of description, when the jury found that none of the lands in controversy were either used or intended for railroad purposes, but that they were all in fact acquired for subdivision into lots and sale to employees of the company, there is really no room for argument on the proposition that the ultimate issues in the case were decided against the plaintiffs in error.

We will here stop to comment on a strange misconception in brief of plaintiff in error, where counsel claim that they understand that the effect of the decision of the Court of Civil Appeals is that the railroad company was "without power" to mortgage the property (see p. 95 *et seq.*). There is nothing of the kind, in the opinion of the Court of Civil Appeals, and no such contention has been made by us. No question arose as to what the railroad company *could* mortgage. The only question was what property did it *in fact* mortgage? The only question of law that could arise in this connection was what is meant by a "railroad purpose"? Without discussing the point, the Court of Civil Appeals held that "the jury were authorized to find that Company No. 1 had put to use all that portion it intended

for railroad purposes, and intended to sell the balance to its employees to build upon, *which latter cannot be held to be for railroad purposes.*" The question of what is a "railroad purpose," as applied to a railroad corporation organized under the statutes of the State of Texas, is obviously a question of local law, not here subject to review. But it may not be improper to show, by citation to the Texas statutes, that this ruling was clearly correct. The Texas Revised Statutes of 1879, under the title "Railroads," provided as follows:

"ART. 4212.—Such corporation shall have the right to take, hold and use such voluntary grants of real estate and other property as shall be made to it in aid of the construction and use of its railway, and to convey the same when no longer required for the use of such railway, in any manner not incompatible with the terms of the original grant.

"ART. 4616.—Such corporation shall have the right to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery for the accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation of its railway, but no railway company shall have the power, either by its own employees or other persons, to construct any buildings along the line of their railroad to be occupied by their employees or others, except at their respective depot stations and section houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter for their employees; nor shall they use, occupy or cultivate any part of the right of way over which their respective roads may pass, with the exception aforesaid, for any other purpose than the construction and keeping in repair their respective railways.

Under these statutes it is obvious that the ruling of the Court of Civil Appeals was correct.

Assignments of Error of Plaintiffs in Error.

We wish to call attention to the fact that the assignments of error of plaintiffs in error, as presented in their brief, pages 27, 28, are very different from the assignments of error found in the record, pages 231 and 233. We have heretofore briefed this case on the assignments found in the record, and, unless we are mistaken as to the practice of this Court, no other or different assignments will be considered. If the Court shall consider the alleged assignments as contained in the brief, we deem it [illegible] to say that the Court of Civil Appeals made none of the rulings that are charged to have been erroneous. The Court of Civil Appeals did not assume to exercise original jurisdiction and decide the questions of fact which had been settled by the special verdict. The Court of Civil Appeals merely decided that on the ultimate facts, as established by the special verdict and agreement of the parties, the trial Court had entered an erroneous judgment, and thereupon proceeded to correct the error.

The only specific assignments of error contained in the record are based upon the refusal of the Court of Civil Appeals to hold that certain special charges were improperly refused. There is no reference whatever to these matters in the alleged assignments contained in brief of plaintiffs in error.

The "Third Point" of Plaintiffs in Error.

This point is expressed in the following proposition on page 105 of brief of plaintiffs in error:

"The property being in the custody of the Federal court, through its receiver appointed in the proceedings therein pending for the foreclosure of the mortgage of the Central Trust Company, sales thereof under process of other courts and by other parties, in disregard of the possession of the Federal court, were void."

We will first call attention to some features of the record that have not heretofore been presented. The final decree foreclosing the Central Trust Company's mortgage was passed on February 26, 1895 (R., 98). Sale thereunder to Pardee was made on August 27, 1895 (R., 98), and confirmed on March 3, 1896 (R., 99), and sale completed by delivery of deed on April 9, 1896 (R., 100). The Court ordered that upon the purchaser complying with his bid and receiving a deed, "the railroad and property so sold shall be, upon demand of said purchaser, or his assigns, delivered to said purchaser by the receiver herein" (R., 99). It thus appears that as early as April, 1896, the foreclosure proceedings were completed, all functions of the Receiver terminated, and that the Receiver thereafter held the property, not subject to the order of the Court, but subject alone to the order of the purchaser, who, for purposes of his own, and from choice alone, appears to have left the property in the hands of the Receiver. The title of defendants in error accrued long after these proceedings occurred. The deeds from the trustees of the first company to Bumpas, trustee, were executed on December 28, 1897 (R., 120), and, of course, all the other proceedings occurred subsequent to that date. Under these circumstances it is settled by the authorities that at the time the title of defendants in error accrued the Federal ostensible receivership had in legal effect ended. When property in the hands of a receiver is sold under order of Court, sale confirmed and complied with, deed made to the purchaser, and Receiver directed to deliver the property to the purchaser on demand, and the purchaser, after a reasonable time, fails to demand possession, but voluntarily leaves the property in the Receiver's hands, such property ceases to be in *custodia legis*, and the Receiver in fact becomes the private agent of the purchaser (H. & T. C. Ry. Co. *v.* Bath, 44 S. W., 595; Animarium Co. *v.* Bright, 82 Fed. Rep., 196; Binghman *v.* Superior Court, 72

Cal., 575; H. & T. C. Ry. Co. *v.* State, 89 Tex., 294, and authorities cited, p. 296; The Holladay Case, 29 Fed. Rep., 226). These cases are directly in point, and we believe that no authority to the contrary can be found.

In the second place, the receivership never extended to anything but the mortgaged property, and the property in controversy was not embraced in the mortgage. There is no evidence that the Receiver was ever in actual possession of the property, and if there had been such evidence it would not place in *custodia legis* property not included in the order appointing a receiver.

In the third place, an order appointing a receiver could not affect the power of the real owners of the property, the trustees of the first company, to convey the property, they not being parties to the receivership suit, or subject to the jurisdiction of the Court.

In the fourth place, the power of these trustees to convey was strictly a question of local law, not subject to review in this Court.

In the fifth place, it is plain that no assignment of error in the record raises the question of the authority of the trustees to convey the property, and the question therefore does not arise, even if the Court would have the jurisdiction to consider the question if properly presented. We believe that all these propositions are sound, but we will not be able to discuss them further. It is to be observed that the question of the validity of the execution sale to Bumpas, trustee, under the Thompson judgment, is wholly immaterial, and was not discussed or decided by the Court of Civil Appeals, because plaintiffs below had acquired good title independent of this execution sale. The elaborate argument of plaintiffs in error on this question will therefore not be further noticed.

What is included in a railroad mortgage?

There is a fair abundance of authorities on what is or is not included in railroad mortgages. In the great majority of the cases the property in controversy has been held not to be included. The reason is that the law requires a reasonably certain description, and most of the controversies arise over the absence of such description. So far as we have found, the question has heretofore arisen three times in Texas. In each of these cases the property in controversy was held not to be included in the mortgage. R. R. Co. v. Whitaker & Bonner, 68 Tex. 630; Shirley v. Waco Tap Ry. Co., 78 Tex. 131; McIlhenney v. Binz, 80 Tex. 1. In the United States Supreme Court the question has arisen in the following cases: Smith v. McCullough, 104 U. S. 25; Alabama v. Montague, 117 U. S. 602; Central Trust Co. v. Kneeland, 138 U. S. 414; R. R. Co. v. United States, 112 U. S. 733; R. R. Co. v. Parker, 143 U. S. 42; Humphries v. McKissock, 140 U. S. 304. In all these cases, except Central Trust Co. v. Kneeland, the property in controversy was held not to be included in the mortgage. This is about the proportion found in the supreme court reports of other states. Inferior federal courts have been perhaps more indulgent to railroad mortgages. In Humphries v. McKissock, 140 U. S. 304, the court says that "under the term appurtenances, as used in the mortgage in question, only such property passes as is *indispensable* to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such cases between what is *indispensable* to the operation of a railroad, and what would be only convenient," and the court cites with approval State v. Commissioners of Mansfield, 22 N. J. L. 510, which expressly draws the line "where the necessity ends and mere convenience begins." This was the rule applied on

issues made by the pleadings on foreclosure proceedings, and not in construing a foreclosure decree. The same rule is declared in Shirley v. Waco Tap Ry. Co., 78 Tex. 136, as follows:—"The authorities are abundant to the effect that whether subsequently acquired property is included in a conveyance (mortgage) executed by a railway company depends upon its being *necessary* to the enjoyment of the franchise or to the operation of the road, in the absence of special description of it in the conveyance." So a conveyance of "all its property real and personal, acquired or to be acquired, owned or to be owned, used or appropriated for operating or maintaining the road" does not include lands acquired by the company and not thus used or employed. A conveyance of "its corporate privileges and appurtenances" was held not to embrace town lots adjoining the road bed, unless as a matter of fact they were essential to the enjoyment of the corporate franchises.

"The purchaser at a foreclosure sale acquires title to the road as *constructed*. 2 Perry on Trusts, sec. 759; Walsh v. Boston, 24 Ohio St. 28; Railway v. Seymour, 25 Barb. 284; Railway v. Elwell, 67 Barb. 83; Railway v. Livermore, 47 Pa. St. 465."

It will be observed in this connection (1) that both the Hughes and Slaughter and Mays tracts were acquired subsequent to the execution of the International Trust Company mortgage; (2) that there was no special description of either tract in the mortgage or foreclosure decree; (3) that none of the land claimed by plaintiffs was ever used by the railroad company, for any purpose, except so much of the Hughes and Slaughter tract as was at one time occupied by a Y; (4) that there is no testimony in the record definitely locating the land so once used as a Y, and the burden of proof on this issue was on defendants; (5) that the jury has found that such use for a Y was of a temporary and not a permanent character, which finding would exclude it from the mortgage, even if the land had been definitely lo-

cated; (2 Elliott on Railroads, 654, § 498); (6) that the jury has found that the Y was not actually used at the date of either mortgage, or at the date of its foreclosure, and that it had been permanently abandoned at the date of the foreclosure of the Central Trust Company mortgage; (7) that the jury has found that all of said tracts claimed by plaintiffs was acquired by the railroad company for the purpose of subdividing the same into lots and selling the same to employees of the company; (8) that the jury has found that said land was not bought by the company for the use, either immediate or prospective, in the "construction, repair or improvement" of its railroad and that neither in 1880 (when the International Trust Company mortgage was executed) nor in 1888 (when the Central Trust Company mortgage was executed) was it reasonably necessary for the present or the prospective use of the railroad company, in the "construction, repair or improvement" of its railroad, then built or authorized by its charter to be built and operated; (9) that the jury has found that considering the reasonable intentions and actual or probable present and future needs of the railroad company, no part of the land claimed by plaintiffs was reasonably necessary for the "construction, equipment or operation," or for the "construction, repairs, renewals, improvement, completion, operation or management of the railroad."

In this state of the record, what possible ground is there for contending that the land is embraced in the mortgages, unless the evidence offered by plaintiffs, the language of the mortgages, and the findings of the jury be all absolutely ignored, as was in substance done by the trial court.

It is true that under the peremptory instruction of the court the jury found *if* the railroad was properly built and operated it would need "as much as 25 acres," and would need "sand," but there is no such finding that applies to the land in controversy; and the jury expressly finds that the land in con-

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troversy was not needed. All these findings are in fact irrelevant, because neither of the mortgages contained any such term of description as land "needed" for any purpose. A head of a family may be in most urgent "need" of a homestead, yet unless his land is actually used for homestead purposes, or at least actually intended for such purposes, it is not his homestead in law or in fact. If there were any substantial doubt as to the purpose for which the land was acquired or used, or whether a railroad use was temporary or permanent, and if the issue were made at the proper time and under proper pleadings, perhaps it might be legitimate to look to the actual or probable necessities of the company, as mere matter of evidence, to aid in solving the doubt. Under the language of the mortgages the necessities of the railroad can certainly not be inquired into for any other purpose. When the jury has solved the doubt, and returned their verdict, all such mere matters of evidence become irrelevant in entering judgment; even if they can be looked to at all after a decree in foreclosure has passed, containing no certain description.

In the trial court's opinion, an unprecedented use is made of the principle that "all the words of a written instrument should be given some effect when the evidence will warrant this." It is argued that because the mortgages specifically described right-of-way, tracks, depots, station houses, etc., something else must be intended by "appurtenances," etc., and therefore the land in controversy or nothing must have been intended. This is "construction" run wild. It is indeed *constructing* a mortgage outright, and not *construing* it. It would not require much of a stretch of this line of reasoning to authorize a court to levy an assessment on the general creditors to buy whatever "appurtenances" the company might "need" and did not happen to have. The absurdity of the position that the land in controversy was intended to be embraced in the "general words" is shown by the fact that the

company did not own the land when these "general words" were put in the mortgage. To what would the court apply these general words if the land had never been bought? Presumably to the bonus lands, in order to "give them effect." And if there were no bonus or other lands, we dare not guess what would happen.

The trial court is in error in saying that "the practical effect of plaintiffs' contention is to confine the operation of this mortgage simply to the land actually occupied by the tracks of the railroad." If such were the result of the verdict of the jury, we would feel justified in saying, let such be the judgment of the court. But such is not our contention, or the practical effect of our contention. A railroad track, we understand, is eight feet wide, counting to the ends of the ties. The jury gives the mortgage 100 feet through the Hughes and Slaughter tract, and 200 feet through the Mays tract, enough land for more tracks and sidings than any railroad in Dallas actually has, and, according to the evidence, probably ten times as much as the Texas Trunk ever *actually* "needed." The jury understood the issue better than the trial court. They were liberal to defendants. Whether liberal or not their verdict must be the basis of the judgment, if a verdict means anything.

We have mentioned some of the principal cases on railroad mortgages, but we do not stop now to discuss them in detail, because in the present state of the record, they are in fact irrelevant. All, or nearly all, came before the court as mixed questions of law and fact. The court was dealing with the *evidence*, not with the *verdict*. Most of them arose on proceedings to foreclose, and on issues made by bill and answer. It is manifest that we have here no such case. We have now nothing to do with the intention of the railroad company, its actual or probable necessities, or the uses to which the land was put. That has all been settled by the verdict. We merely ask for judgment on this verdict.

The case on its merits.

Opposing counsel have presented this case from entirely different points of view. Opposing counsel in effect ask this Court to exercise original jurisdiction and pass on the facts, ignoring the verdict of the jury. We ask the Court to observe the rules govering a court of error and the limitations on the jurisdiction of this Court established by act of Congress. But we will close this argument by meeting opposing counsel on their own ground. Counsel undertakes at great length to point out what a prospective bidder at the foreclosure sales would have discovered.

The court will doubtless note that opposing counsel think that a prospective and inquisitive bidder would upon enquiry, have ascertained a good many things that were not so, among them, that the property now claimed by plaintiffs was acquired or used for railroad purposes, or that it was suitable for a terminal. But the prospective bidder would also have learned a number of things not mentioned by counsel. In ascertaining that the "flat iron" tract, originally and exclusively intended for the terminal, had not been paid for, he would also have learned that the Company had not acquired, as it has never acquired, the title to 2570 feet of right of way south of the Hughes & Slaughter tract, and without which said tract could not be reached at all.

He would also have ascertained that the Company was still in possession of the "flat-iron" tract, as they are still in possession of part of it, though without title; and he would doubtless have concluded that there was then quite as much probability of acquiring the "flat iron" tract, owned by Gaston, for a terminal, as there was of acquiring the 2570 feet right-of-way, also owned by Gaston, and without which the Hughes & Slaughter tract could not be reached. This probability would have been strengthened by the fact that both the "flat-iron" tract and the 2570 feet of right-of-way were owned

by the same man, were still in the possession of the Company, had been contracted to the Company at one time, and in one transaction, and for a single consideration, and therefore the Company would probably have to take all or none, and if they acquired none they could not, and therefore would not intend to use any part of the Hughes & Slaughter tract for any railroad purpose. He would also have learned, if he had asked Gen. Cabell, the general manager and acting president of the Company, that the land now claimed by plaintiffs was acquired for subdivision and sale into town lots, and he would have seen that the land was eminently suited to this purpose. If, as astutely suggested by counsel, he had supposed that on account of the failure to pay for the Gaston "flat-iron" tract the Company had changed its mind, and had concluded to use the Hughes & Slaughter tract for a terminal, thus for the first time bringing it under the mortgage, by a mysterious sort of mental transmutation, he would have been bluntly told by Gen Cabell, as he testified in this case: "*We did not consider at all the contingencies that would arise from non-payment. We considered the Gaston land very important, for the reason that it was closely connected with the Texas and Pacific, and it was in a fine location.*" He would have seen that none of the land now claimed by plaintiffs was actually used for railroad purposes, and that the improvements on that portion of the land *not* claimed by plaintiffs were of the most trifling character imaginable. He would have at once seen that on account of its distance from the city and from other roads, if for no other reason, the land was, as it is still admitted to be by defendants' "star" witness, Whyte, utterly unsuitable for a terminal; that on this account the Company was then using, as its successors have ever since used, the Dallas terminals of other roads; and, as a sensible man, he would doubtless have concluded, as all of the owners of the road have evidently since concluded, that a little railroad from Dallas to Kauf-

man, with no apparent purpose at that time of ever going much or any further, could better serve itself and the public by dispensing with the luxury and style of an extensive and expensive independent terminal, some two or three miles through black waxy mud from town, and using, as it has ever since used, and will doubtless continue to use, the Dallas terminals of other railroads. If at first he was struck with the Company's "high-sounding" name and the millions of dollars mentioned in its charter, and especially in its mortgage, he would afterwards have learned that the total capital of the concern had never in fact been more than $21,000, and that it was hopelessly swamped. If nevertheless he had found the owners of the road, like the exhuberant Mark Topley, still hopeful and "jolly," he would merely have thought of the remark of Bill Nye's western boomer: "This is the greatest country on earth. When I came here three years' ago I wasn't worth a cent—and now, I owe two millions." If, finally, he had consulted the records, every doubt would have been removed, for there he would have found (and it is all he would have found in any record), that the Company rendered 22.08 acres of the Hughes & Slaughter 25 acres tract, or more than plaintiffs now claim, as "land and town lots in the county, *exclusive of right-of-way and depot grounds,*" and that less than three acres of the tract was included under "right-of-way, road-bed, superstructures, depots and grounds upon which said depots are situate, and all shops and fixtures of every kind used in operating the road." In other words, he would have found that *the only thing of record indicating the purpose of the Company in buying the property, was a solemn and official declaration under oath, to the tax assessor, that all of the lands now claimed by plaintiffs, as well as more land not claimed by plaintiffs, were not used or acquired by the railroad Company for railroad purposes.* This information he would be reasonably certain to get, as every prudent purchaser examines the tax rolls.

A prospective bidder under the Central Trust Company foreclosure, pursuing the course recommended by opposing counsel, would also have found that without apparent objection from the railroad, streets had been opened across the land, and that two lines of double track street cars ran along and across it, all of which would conflict with the idea of the exclusive reservation of the property as a railroad terminal. He would have found that only a short time after the Central Trust Company mortgage was executed, the Company had procured a quit claim deed from Aspley to quiet title to 50 feet on each side of the center of its track through the Hughes & Slaughter tract, but had obtained no deed to that part of the land now claimed by plaintiffs, either because the Company did not claim to own it, as in fact it did not, or because the Company did not intend to hold and use it if it did own it. He would have found that the land had never been used except for streets, street cars, and "semi-occasionally for circuses." He would have found, indeed, that the land had never been sub-divided and sold into town lots, but unlike opposing counsel, he would have readily accounted for this phenomenon, upon which defendants lay such stress, by the fact that the owners of the land, the trustees of the first sold out Company, had no authority to so dispose of the land, and that, in the involved condition of its title, they doubtless could not sell it, without extraordinary sacrifice, to anybody for any purpose. He would have had much more difficulty in accounting for what he saw, on the theory that the property was really owned by the third Company, and was in good faith held for terminal purposes. He would have learned that every vestige of an improvement for terminal purposes had been erased; that starting a couple of miles below town, the road had, at great expense, built a new line to the H. & T. C. terminals; leaving both the Hughes & Slaughter tract and the Mays tract completely off the line of road. He would have

had some difficulty in accounting for the failure to erect terminals on the Hughes & Slaughter tract on account of lack of funds, because funds were readily forthcoming to the extent of at least $12,000 to connect with the H. & T. C. terminal. Besides, the Company had sold Huntington bonds to the amount of $1,000,000, for which Huntington had undoubtedly paid the Company par, because Huntington was a law-abiding man, and cheerfully obeyed the Constitution and Statutes of Texas in such case made and provided. Moreover, the Federal Court had but recently given him judgment for the principal and interest on these very bonds, amounting to $1,308,-814.33, and who could thereafter doubt that the money had passed and that the debt was just? If he had been told that the Trunk had no definite or continuing arrangements with the Central, he would have thought, how extraordinary, to spend $12,000 to connect with the Central, under such circumstances; and he would probably have guessed, as everybody believes, that the Trunk and the Central is one and the same thing; that there was no definite contract between them, because Huntington did not need to contract with himself; and that whatever becomes of this suit, there is no more likelihood of Huntington using the Hughes & Slaughter tract as a terminal, than there is of his establishing a terminal for the Trunk in Egypt.

If he had looked to the charter of the Company, as opposing counsel say he should, in order to discover the probable intentions of the Company, he would have found that when the Central Trust Company mortgage was executed the Company had only a 50 miles charter, with no lawful power to renew or extend; and that at the time of the foreclosure it had no charter at all. If finally he had sought light from the experience of those who had gone before, he would have found that the purchasers under the International Trust Co. mortgage and their successors, had claimed, as included in the mortgage, all the Kaufman and Houston county

lands (though it is admitted now that they were mistaken) and that this claim was quite as strong as their claim to the Hughes & Slaughter and Mays tracts; and this would likely have shaken his confidence in a title resting merely on the disposition to "claim everything."

We respectfully submit that our supposed curious enquirer, if he had average experience and common sense, and was not carried away by "castles in the air" and "expert opinions," would in all probability have reached the same conclusion that the jury reached in this case. At least one who, under these circumstances, would undertake to "surmise or guess as to what the officer intended to sell" and would guess that the lands now in controversy were included, would not, in the language of opposing counsel, be a "person with sense enough to be entrusted with money for any purpose." He would not have the "means of complete information" which law and common sense require. (See appendix to our original brief for complete statement of the facts.)

As a matter of common sense, could anything be more preposterous than to expect prospective bidders at a judicial sale to make any such enquiry as opposing counsel recommend? And in view of the facts, is there any foundation whatever for the claim that the land was acquired for railroad purposes? We think that the undisputed evidence shows quite the contrary; but it is unnecessary for us to make this contention, because the jury has found in our favor, and their findings are amply supported by the evidence, and whether snpported by the evidence or not, as no motion has been made to set them aside, and there is no assignment of error questioning their correctness, they cannot now be reviewed, even if the court had the jurisdiction to review questions of fact.

Respectfully submitted,

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